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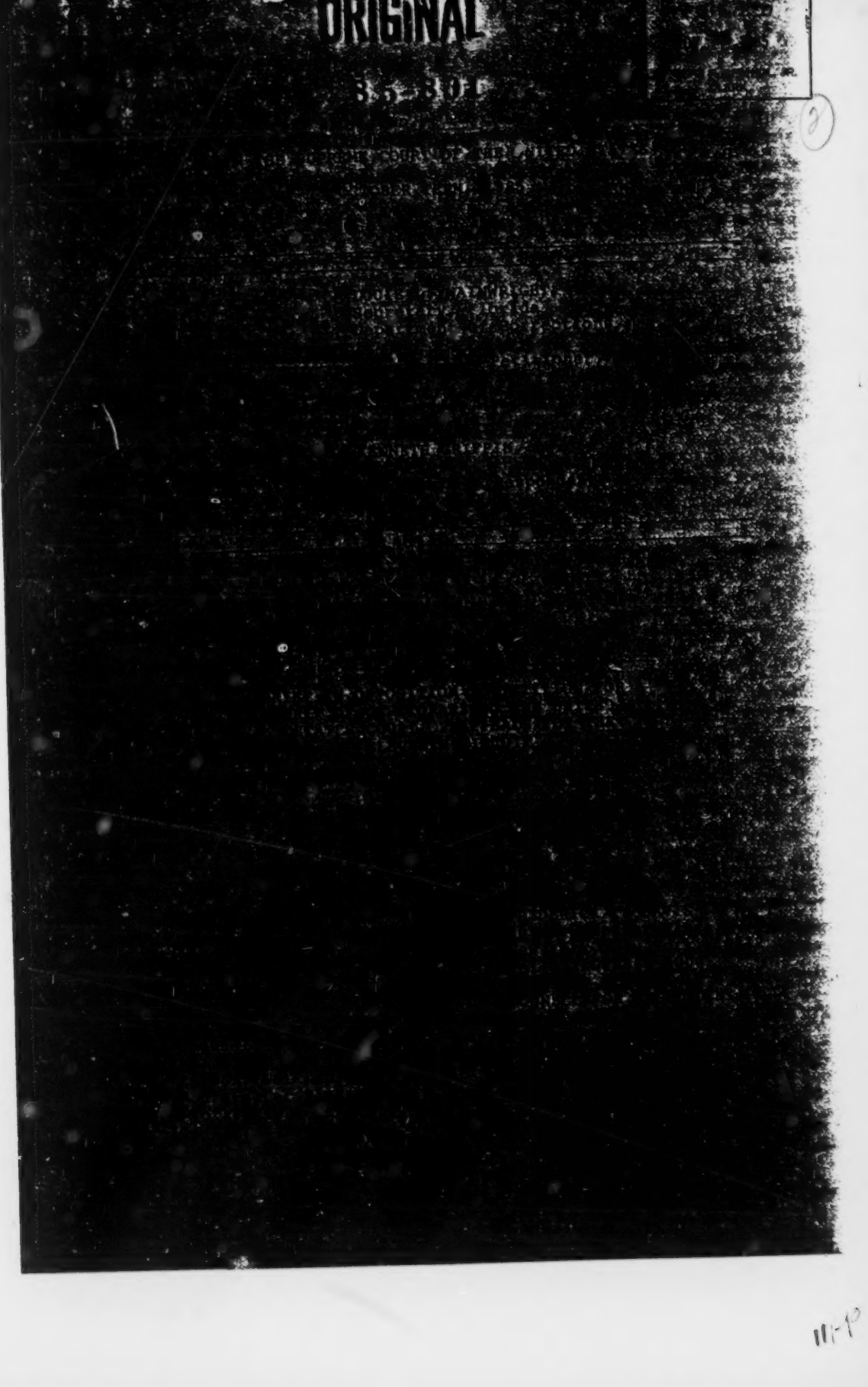
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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LOUIE L. WAINWRIGHT,
Secretary, Florida
Department of Corrections,

Petitioner,

v.

KENNETH GRIFFIN,

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent Kenneth Griffin respectfully requests that Petitioner's petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered on May 10, 1985 be denied, and that his own petition, previously submitted to the Court, be granted and the writ issued.

PRELIMINARY STATEMENT

The parties to this case agree that whether Florida's system for imposing the death penalty is racially discriminatory is an issue properly before this Court. The State of Florida, however, asserts that such a fundamental constitutional challenge, based on substantial empirical evidence, should never be given plenary consideration by this Court. Respondent Kenneth Griffin, on the other hand, simply seeks an evidentiary

hearing in the District Court so that a record can be developed for serious consideration by the federal judiciary.

On the merits, the issue is relatively straightforward. In 1972, this Court struck down then-existing death penalty statutes, in part because of concern about racial discrimination in their imposition. Furman v. Georgia, 408 U.S. 238, 249-256 (1972) (Douglas, J. concurring); id. at 310 (Stewart, J., concurring); id. at 364 (Marsnall, J., concurring). Simply put, it appeared that blacks were being executed for crimes for which whites would not have been.

By and large, that form of racial discrimination appears no longer to prevail. Instead, a much more invidious form of discrimination has apparently grown up: discrimination based on the race of the victim; that is, a pattern of executions apparently premised on the notion that the lives of black victims are "cheaper" than those of whites, and that taking a black life is therefore deserving of less serious punishment.

Presumably, a state law which permitted the white race of a victim to be considered as an "aggravating" circumstance in the penalty phase of a capital trial -- or a statute which made the black race of a victim a "mitigating" circumstance -- would be instantly struck down by this Court. See Furman v. Georgia, 408 U.S. 238, 256 (1972) (Douglas, J., concurring). Yet, persuasive evidence exists, and exists in this case,* that precisely the same effect as would be intended

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* Included in this evidence is the fact that six times during Mr. Griffin's five-day trial, the prosecutor found occasion to remind the jury of the race of the victims in the case. While the lower courts have held that these references were for purposes of identification, the truth

(footnote continued on next page)

by the framers of such a non-existent statute is being achieved under color of law in Florida.* Kenneth Griffin seeks only to develop this evidence at a federal hearing, and then to present it for adjudication. Petitioner seeks to foreclose the question, as a matter of law, not because it doubts the evidence, but because it hopes to continue to head off any serious, plenary consideration of such distasteful circumstances by this Court.** But refusing to face facts does not change them.

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(footnote continued from previous page)

is that the victims' identification was never in dispute in any way. No witness made any reference to race except as he was requested to do so by the prosecutor.

* Petitioner insists that the law requires a specific finding of intent to discriminate against Kenneth Griffin. Such intent, however, can also be inferred here, just as it would be if the hypothetical statute discussed in the text were passed without any legislative history. Surely the requirement of intent does not mean that discriminatory deeds must be accompanied by overt words stating an intent in order to be actionable.

** The Petition of the State of Florida significantly omits the fact that none of the statements in Wainwright v. Ford, 104 S. Ct. 3498 (1984); Wainwright v. Adams, 104 S. Ct. 2183 (1984) and Sullivan v. Wainwright, 464 U.S. 109 (1983) followed plenary consideration of the issues by this Court. Sullivan was an application for a stay of execution, decided the day after it was made, and Justice Brennan was forced to note that "Sullivan's claim has not received the thoughtful consideration to which it is entitled." 464 U.S. at 113 (Brennan, J., dissenting) In Adams, the Court rendered its decision in one day, refusing Justice Marshall a second day in which to write a full dissent, and causing him to assert that "The haste and confusion surrounding this decision is degrading to our role as judges . . . the Court has utterly failed to attend to this case with the careful deliberation it deserves." 104 S.Ct. at 2184, 2185 (Marshall, J., dissenting). The cited language in Ford, also decided within one day, represented the views of only three justices, and then in the alternative. Moreover, Ford, unlike the present case, presented the possibility that petitioner there had abused the writ of habeas corpus, and, also unlike the instant action, involved unexcused procedural default.

## ARGUMENT

### KENNETH GRIFFIN IS ENTITLED TO A FEDERAL EVIDENTIARY HEARING ON HIS EMPIRICAL SHOWING THAT FLORIDA'S DEATH PENALTY SYSTEM SEEKS TO DISCRIMINATE AGAINST HIM ON THE BASIS OF RACE

In remanding this case to the District Court on the issue of racial discrimination, the Eleventh Circuit directed that the District Court reconsider the issue "in light of our recent en banc holdings in McCleskey [v. Kemp, 753 F.2d 877 (11th Cir. 1985)] and Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985)." 760 F.2d 1505, 1518 (11th Cir. 1985). The Court of Appeals went on, however, specifically to note that it did "not imply that the district court must necessarily hold a full evidentiary hearing on this issue; whether an evidentiary hearing is required will depend on the presence or absence of factual issues." Ibid. Respondent Kenneth Griffin asserts that such an evidentiary hearing is necessary, so that a factual record can be developed on this fundamental constitutional issue.

No such record has yet been developed because of the way this case moved through the state and lower federal courts in March 1984. To briefly recapitulate those events, present counsel entered the case on March 1, 1984, after efforts to secure a Florida lawyer had failed and the President of the Florida State Bar had written that local attorneys were "intimidated" by Mr. Griffin's imminent execution date of March 20. The Death Warrant then in effect was the first issued for Mr. Griffin; no proceedings for post-conviction relief had been held in any court, although Mr. Griffin had filed a perfunctory motion for such a relief on April 20, 1983.

New counsel moved for post-conviction relief on Tuesday, March 6. Extensive supporting papers, including the statistical studies at issue here, were filed on Friday, March 9. Two and one-half hours later the state trial court held all of Mr. Griffin's claims except that of ineffective assistance of counsel barred by procedural default.* Thus, no hearing was held on this issue, and no evidence relating to the racial discrimination claim could be developed in state court.

The hearing on ineffective assistance of counsel was held on Tuesday, March 13, and Mr. Griffin's motion was denied late that same night. On Wednesday morning, March 14, Mr. Griffin appealed to the Supreme Court of Florida. That Court heard argument on March 15 and affirmed the trial court in all respects on Friday, March 16. Mr. Griffin's petition for a writ of habeas corpus was filed in the District Court that same afternoon.

On Monday, March 19, with Mr. Griffin's execution then scheduled for the next day, the District Court heard oral argument, and then issued a 72-hour stay of execution. On the racial discrimination issue, the District Court was presented with only the statistical evidence, but counsel specifically asked for an evidentiary hearing to develop the factual record with regard to Mr. Griffin personally. The request for hearing was denied.

Serious doubt must be raised even about whether the District Court fully considered the proffered statistical stud-

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* The District Court and the Court of Appeals in this case both later held that this procedural ruling was in error and that under Florida law the state trial court should have addressed this issue on the merits. 588 F. Supp. 1549, 1568 (M.D. Fla. 1984); 760 F.2d at 1518.

ies, which are extensive.* The District Court issued its 48-page opinion at 4:25 a.m. on Wednesday, March 21. The District Judge had apparently not read the studies at the time of oral argument, and then had the case sub judice for only 40 hours. When the District Court's opinion was issued, Mr. Griffin's scheduled execution was just over 50 hours away. While the District Court held that the racial discrimination claim was not barred by procedural default, 588 F. Supp. at 1568,** it provided neither the time nor an opportunity for the claim to be developed or considered. Only later that day did the Court of Appeals stay the execution beyond the expiration of the Death Warrant.

It must be clear that such a timetable is not conducive to judicious considerations of life-and-death issues. Moreover, it virtually negates any possibility that a meaningful record can be developed on evidentiary questions as complex as the racial discrimination claim presented here.

The State of Florida's contention that no remand whatsoever is warranted is disposed of squarely by the Court of Appeals' opinion itself. Such a remand is necessitated by two factors: first, that the applicable legal standard has changed, in light of the Eleventh Circuit's acknowledgement that "Spinkellink [v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)] can not be read to foreclose

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* Perhaps the most significant of the studies, that by Gross and Mauro, has recently been published in the Stanford Law Review. Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homocide Victimization, 37 Stan. L. Rev. 17 (1985).

** This holding of no procedural default was subsequently affirmed by the Court of appeals. 760 F. 2d at 1518. See Henry v. State, 377 So. 2d 692 (Fla. 1979).

automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute." McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985) and second that, as the Court of Appeals acknowledged in a footnote, 760 F.2d at 1518 n.3, the cases setting forth the new standard, McCleskey and Ross, dealt solely with Georgia cases, while this case arose, and the data for these studies was produced, in Florida.

On remand, if granted an evidentiary hearing, Mr. Griffin would present expert testimony on race discrimination in Florida and on the methodology involved in the proffered studies. At such a hearing, the State could and should be directed to produce evidence on these issues within its possession. No hearing like that proposed has ever been held on the statistically apparent race bias in Florida's death penalty system. The time for such an inquiry by our federal courts is long past due.

## CONCLUSION

For the reasons set forth above, the Petitioner State of Florida's petition should be denied. Respondent Kenneth Griffin's petition granted, and the Writ of Certiorari issued to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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